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Supreme Court, U.S.
FILED

No. 95-219 JUL 25 1995

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1995

BILLY L. LEE,
Petitioner

v.

SARAH RENAE M. WALTON,
Respondent

Petition for Writ Of Certiorari
To The Court of Appeals for the
Ninth District of Texas at
Beaumont, Texas

PETITION FOR WRIT OF CERTIORARI

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49 pp

QUESTION PRESENTED FOR REVIEW

Introductory Statement

After this Court's decision in *McCarthy v. McCarthy*, 453 U.S. 210 (1981), Congress enacted the Uniformed Services Former Spouses Protection Act ("USFSPA") which in turn triggered a plethora of litigation seeking to divide military retirement pay between divorced spouses. Consequently, Congress amended the USFSPA in 1990 to provide that:

> ***[a] court may not treat retired pay as property*** in any proceeding to divide or partition any amount of retired pay ***of a member as property of the member and the member's spouse or former spouse if a final decree of divorce,*** dissolution, annulment, or legal separation ... affecting the member and the member's spouse or former spouse (A) ***was issued before June 25, 1981, and*** (B) ***did not treat (or reserve jurisdiction to treat)*** any amount of retired pay of the member as property of the member and the member's spouse or former spouse. (Emphasis added.)

Question Presented

Does the opinion of the Court of Appeals for the Ninth District of Texas at Beaumont which states that "under Texas law the courts automatically 'treat (or reserve jurisdiction to treat) any amount of retired pay of the member' by virtue of the laws governing ownership of undivided property, and subsequent partition is not precluded by federal law" preempt the USFSPA, as amended?

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No._____

In The

Supreme Court of the United States

October Term, 1995

BILLY L. LEE,
Petitioner

v.

SARAH RENAE M. WALTON,
Respondent

Petition for Writ Of Certiorari
To The Court of Appeals for the
Ninth District of Texas at
Beaumont, Texas

Petitioner, Billy L. Lee, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Ninth District of Texas at Beaumont holding that Texas courts automatically treat (or reserve jurisdiction to treat) military retirement pay of the member as property of the member and the member's spouse.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth District of Texas is reported as *Walton v. Lee,* 888 S.W.2d 604 (Tex.App.-Beaumont, 1994), and appears in Appendix A to this Petition. The unpublished written final summary judgment issued in favor of Petitioner by the 9th/2nd/9th Judicial District Court of Montgomery County, Texas appears in Appendix G.

JURISDICTION

The Court of Appeals' Opinion in this matter was filed on December 1, 1994. Petitioner filed a timely Motion for Rehearing. The Court of Appeals' denial of the Motion for Rehearing was issued on December 21, 1994 and is set forth in Appendix C. A timely Application for Writ of Error was filed with the Texas Supreme Court by Petitioner on January 20, 1995. The denial of the Application for Writ of Error was issued by the Texas Supreme Court on March 30, 1995, and is set forth in Appendix D. Petitioner filed his timely Motion for Rehearing with the Texas Supreme Court on April 11, 1995 which was denied by the Texas Supreme Court on April 27, 1995. The denial of the Motion for Rehearing is set forth in Appendix D. This Court's jurisdiction is invoked pursuant to Title 28, U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 10, U.S.C. §1408, Uniform Services Former Spouses Protection Act, is set forth in Appendix E.

STATEMENT OF THE CASE

Petitioner enlisted in the military service on January 7, 1959 and was married to Respondent on August 3, 1961. The parties were divorced on November 4, 1976 in Montgomery County, Texas. Subsequently, on July 31, 1981 Petitioner retired and was discharged from the military. On January 21, 1992, Respondent brought an

action against Petitioner in the 9th/2nd/9th Judicial District Court of Texas, Montgomery, Texas, seeking a partition of Petitioner's military retirement pay. Petitioner moved for summary judgement contending that Respondent was barred from seeking partition of Petitioner's military retirement pay pursuant to the provisions of 10 U.S.C. §1408 where the decree of divorce was rendered and property settlement agreement was executed prior to June 25, 1981 and the judgment did not treat, or reserve jurisdiction to treat, Petitioner's military retirement pay as community property. The trial court granted Petitioner's motion and Respondent timely perfected appeal to the Court of Appeals for the Ninth District of Texas at Beaumont.

In his reply brief and at oral argument before the Court of Appeals, Petitioner relied on the 1990 amendment to the Uniform Services Former Spouses Protection Act (hereinafter referred to as "USFSPA"), 10 U.S.C. §1408(c)(1). Petitioner argued that the final decree of divorce was issued before June 25, 1981, and did not treat, or reserve jurisdiction to treat, any amount of retirement pay as property of Petitioner and Respondent and consequently, Respondent was precluded from seeking a partition of Petitioner's military retirement pay.

The Court of Appeals for the Ninth District of Texas delivered its opinion on December 1, 1994 and held that "under Texas law the courts automatically 'treat (or reserve jurisdiction to treat) any amount of retired pay of the member' by virtue of the laws governing ownership of undivided property, and subsequent partition is not precluded by federal law" and reversed the judgment of and remanded the case to the trial court. The dissenting opinion filed by the Chief Justice stated that to hold that Texas Courts automatically treat, or reserve jurisdiction to treat military retirement pay as property of the parties "is a fiction which flies in the face of the preemptive nature of Section 1408(c)(1)."

Petitioner filed an Application for Writ of Error to the Texas Supreme Court which was denied on March 30, 1995. On April 27, 1995, the Texas Supreme Court denied Petitioner's Motion for Rehearing.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the issue presented is an important question of federal law which has not been, but should be, settled by this Court and the Opinion of the Court of Appeals conflicts with the decision of another Texas Court of Appeals and with the decisions of several other states.

The USFSPA was enacted in response to *McCarthy v. McCarthy*, 453 U.S. 210 (1981) and is clear and unambiguous. In pertinent part it states:

> [s]ubject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

Because of the myriad of cases being reopened as a result of the USFSPA, Congress again responded and amended the USFSPA in 1990. *Redus v. Redus*, 852 S.W.2d 94 (Tex.App.-Austin, 1993). The 1990 amendment is equally unambiguous. It states:

> [a] court may not treat retired pay as property in any proceeding to divide or partition any amount of retired pay of a member as property of the member and the member's spouse or former spouse if a final decree of divorce, dissolution, annulment, or legal separation (including a court ordered, ratified, or approved property settlement incident to such decree) affecting the member and the member's spouse or former spouse (A) was issued before June 25, 1981, and (B) did not treat (or reserve jurisdiction to treat) any amount of retired pay of the member as property of the member and the member's spouse or former spouse.

It cannot be questioned that Congress enacted the 1990 amendment to curb the plethora of litigation which ensued as a result of the passage of USFSPA. The legislative history reveals:

> [t]he committee is concerned because some state courts have been less than faithful in their adherence to the spirit of the law. The reopening of divorce cases finalized before the Supreme Court's decision in *McCarthy v. McCarthy* that did not divide retired pay continues to be a significant problem. Years after final divorce decrees have been issued, some state courts, particularly those in California, have reopened cases (through partition actions or otherwise) to award a share of retired pay. **Although Congress has twice stated in report language that this result was not intended, the practice continues unabated.** Such action is inconsistent with the notion that a final decree of divorce represents a final disposition of the marital estate. H.R. Rep. No. 665, 101st Cong., 2d Sess. 279, reprinted in 1990 U.S. Code Cong. & Admin. News 2931, 3005. (Emphasis added.)

The opinion of the Texas Court of Appeals for the Ninth District is the precise type of abuse Congress was attempting to curb by enacting the 1990 amendment.

In *Knowles v. Knowles,* 811 S.W.2d 709 (Tex.App.-Tyler, 1991) another Texas Court of Appeals held that a court could not partition a husband's military retirement benefits, as the decree of divorce had not reserved jurisdiction to treat any amount of retired pay and stated:

> [a]ppellant further argues that we should construe section 1408, as amended in 1990, to permit her recovery or her proper share of appellee's military retirement benefits accruing after June 25, 1981. In order to so construe the unambiguous language thereof, providing that, if the divorce decree "(A) was

> issued before June 25, 1981, and (B) did not treat (or reserve jurisdiction to treat) any amount of retired pay ..." then the state court may not "divide or partition any amount of retired pay of a member ..." We decline to do so.

Louisiana, another community property state has decided the issue in *Dunham v. Dunham,* 602 So.2d 1139 (La.App. 1 Cir., 1992). In that case the Louisiana court stated:

> Congress ... enacted the Uniformed Services Former Spouse Protection Act (USFSPA) to overrule *McCarthy.* The Act states that it applies to retirement pay periods after June 25, 1981. Accordingly, it was well established in Louisiana, as apparently it was elsewhere, that the USFSPA applied retroactively to a variety of fact situations. Indeed, it was the widespread practice of applying the statute retroactively that prompted the 1990 amendment, because Congress disapproved of the "reopening of divorce cases" through partition cases or otherwise to award former spouses shares in military retirement pay. (Cite omitted.)
>
> Accordingly, the issue in partition litigation subsequent to the 1990 amendment bars a case that in this state would have been "reopened" pursuant to a retroactive application of the USFSPA. In other words, can the 1990 amendment be applied retroactively to bar an action by a former spouse who, but for the amendment, would have been entitled to a portion of her former husband's military retirement pay? We conclude that the amendment applies retroactively to bar the action.

In *Johnson v. Johnson,* 824 P.2d 1381 (Alaska, 1992), it was held:

> [c]learly the 1990 amendment preempts any right to relief that [the former spouse] might have had under Alaska law because the 1977 divorce decree is a final decree, it was issued before June 25, 1981, and it did not treat, or reserve jurisdiction to treat, any amount of [the member's] retired military benefits as marital property.
>
> ...
>
> Although it is undoubtedly a hardship for [the former spouse], her arguments cannot overcome the clear language of the act.

It cannot be doubted that the 1990 amendment precludes the partition of military retirement pay sought by Respondent in this case. As stated in the dissenting opinion in the Court of Appeals "[o]ur trial court did not 'treat' (or reserve jurisdiction to treat) the military retirement subject matter. To hold that Texas Courts do so automatically, is a fiction which flies in the face of the preemptive nature of Section 1408(c)(1)."

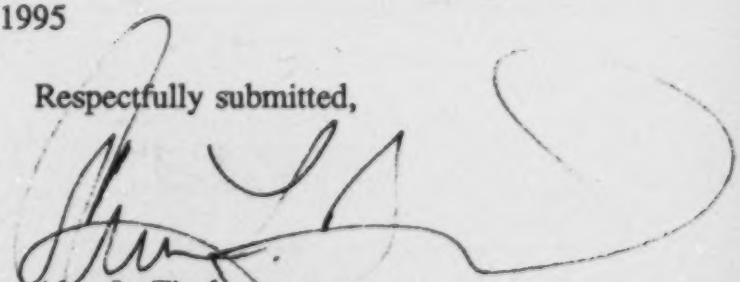
This Court should grant certiorari in this case to explicitly rule that Respondent's attempts at partition are preempted by the USFSPA.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals in this matter.

DATED: July 25, 1995

Respectfully submitted,



Alan L. Tinsley
Attorney for Petitioner

Filed
December 1, 1994
Shirley Forrest, Clerk
Court of Appeals
Ninth District
Beaumont, Texas

In The

COURT OF APPEALS

Ninth District of Texas at Beaumont

NO. 09-93-018-CV

SARAH RENAE M. WALTON, Appellant

V.

BILLY L. LEE, Appellee

On Appeal from the 9th District Court
Montgomery County, Texas
Cause No. 92-01-00153-CV

Appendix A

OPINION

Sarah Renae M. Walton filed a suit to partition military retirement benefits which were not divided in her 1976 divorce from Billy L. Lee. Lee moved for summary judgment on the grounds that as a matter of law the court could not partition military benefits if the divorce decree was issued before June 25, 1981, and failed to treat the benefits in the initial decree. The court granted Lee's motion and entered a summary judgment from which Walton appeals with two points of error.

Point of error one contends the trial court erred in granting summary judgment. The pertinent dates are:

January 7, 1959	Lee enlists in Air Force
August 3, 1961	Lee and Walton wed
November 4, 1976	Lee and Walton divorce
December 15, 1976	*Cearley v. Cearley*[1] *decided*
June 26, 198	*McCarty v. McCarty*[2] decided
July 31, 1981	Lee retires from Air Force

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1 544 S.W. 2d 661 (Tex. 1976).

2 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981).

February 1, 1983	10 U.S.C. § 1408 (1983)[3]("USFSPA") effective
November 5, 1990	10 U.S.C. § 1408(c)(1) (Supp. 1994) enacted
January 21, 1992	Walton files partition suit

In *Cearley*, the Texas Supreme Court settled a split of authority between the Courts of Appeals by holding that unvested military retirement benefits constituted a contingent interest in property and a community interest subject to division upon divorce. In *McCarty*, the United States Supreme Court held that military retirement benefits were a personal entitlement to which the state courts could not apply community property laws. Congress legislatively overruled *McCarty* by enacting 10 U.S.C. § 1408, which provided: "Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such

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[3] The Uniformed Services Former Spouses Protection Act

court." Congress amended this section in 1990, adding the following:

> A court may not treat retired pay as property in any proceeding to divide or partition any amount of retired pay of a member as the property of the member and the member's spouse or former spouse if a final decree of divorce, dissolution, annulment, or legal separation (including a court ordered, ratified, or approved property settlement incident to such decree) affecting the member and the member's spouse or former spouse (A) was issued before June 25, 1981, and (B) did not treat (or reserve jurisdiction to treat) any amount of retired pay of he member as property of the member and the member's spouse or former spouse.

Upon entry of a divorce decree the former spouses hold any undivided community property as tenants in common. *Busby v. Busby*, 457 S.W.2d 551 (Tex. 1970). In cases where the divorce decree was entered prior to November 1, 1987,[4] the commonly held property is divisible through suit for partition governed by the rules applicable to civil cases generally. *Templet v. Templet*, 728 S.W.2d 844

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[4] The effective date of TEX. FAM. CODE ANN §3.90-3.92 (Vernon 1993).

(Tex. App. -- Beaumont 1987, no writ). We hold that under Texas law the courts automatically "treat (or reserve jurisdiction to treat) any amount of retired pay of the member" by virtue of the laws governing ownership of undivided property, and subsequent partition is not precluded by federal law. We are aware that a similar argument was addressed and rejected in *Knowles v. Knowles*, 811 S.W.2d 709 (Tex. App. -- Tyler 1991, no writ). Point of error one is sustained. We decline to address the constitutional error presented by point of error two. We reverse the judgment and remand this case to the trial court.

REVERSED AND REMANDED.

s/ Don Burgess
DON BURGESS
Justice

Submitted on September 22, 1994
Opinion Delivered December 1, 1994
Publish

Before Walker, C.J., Brookshire and Burgess, JJ.

DISSENT

The majority opinion is inapposite to 10 U.S.C.A. § 1408(c)(1). Our appellee and appellant were divorced prior to June 25, 1981 (November 4, 1976). The United States Congress said "A Court may not treat retired pay as property in any proceeding to divide or partition any amount of retired pay of a member as the property of the member and the member's spouse or former spouse if a final decree of divorce, dissolution, annulment, or legal separation (including a court ordered, ratified, or approved property settlement incident to such decree) affecting the member and the member's spouse or former spouse (A) was issued before June 25, 1981, and (B) did not treat (or reserve jurisdiction to treat) any amount of retired pay of the member as property of the member and the member's spouse or former spouse." (emphasis mine).

Our trial court did not "treat" (or reserve jurisdiction to treat) the military retirement subject matter. To hold that Texas Courts do so automatically, is a fiction which files in

the face of the preemptive nature of Section 1408(c)(1). See *Knowles v. Knowles*, 811 S.W.2d 709 (Tex. App. – Tyler 1991, no writ). Thus, I respectfully file this dissent.

s/ Ronald L. Walker
RONALD L. WALKER
Chief Justice

Dissent Delivered
December 1, 1994
Publish

COURT OF APPEALS
NINTH DISTRICT OF THE STATE OF TEXAS
1001 Pearl, Suite 310
Beaumont, Texas 77701

Judgment entered December 1, 1994

Sarah Renae M. Walton

vs No. 09-93-018 CV

Billy L. Lee

Appealed from the 9th District Court of Montgomery County

Opinion by Justice Don Burgess

This cause came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this Court that there was error in the judgment; it is therefore considered, adjudged and ordered that the judgment of the Court below be reversed and the cause remanded to the trial court. REVERSED AND REMANDED. A copy of this judgment shall be certified below for observation.

Appendix B

A true copy of this judgment, to be entered, I hereby certify.

s/ Shirley Forrest
Shirley Forrest,
Clerk

Denied and overruled
Dec. 21, 1994

CJB DB

Filed
December 16, 1994
Shirley Forrest,
Clerk
Court of Appeals
Ninth Distirct
Beaumont, Texas

In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-93-018 CV

SARAH RENEA M. WALTON, Appellant

V.

BILLY L. LEE, Appellee

On Appeal from the 9th District Court
Montgomery County, Texas
Cause No. 92-01-00153-CV

MOTION FOR REHEARING

Appendix C

BILLY L. LEE, Appellee in this cause, makes this motion for a rehearing of the judgment of the Court rendered on December 1, 1994, as shows:

I.

POINT OF ERROR

The court of appeals erred in reversing the trial court's judgment and remanding the cause to the trial court on the basis that the trial court erred in granting Appellee's Motion for Summary Judgment by holding that "the courts automatically 'treat

IN THE SUPREME COURT OF TEXAS

****

March 30, 1995

NO. 95-0087	)
	)
BILLY L. LEE	)
	)
v.	) From MONTGOMERY
	) County, 9th District
	)
SARAH RENAE M. WALTON	)

Application of petitioner for writ of error to the Court of Appeals for the Ninth District having been duly considered, and the Court having determined that the application presents no error of law which is of such importance to the jurisprudence of the State as to require correction, or reversal of the judgment of the Court of Appeals, it is ordered that said application be, and hereby is, denied.

It is further ordered that applicant, Billy L. Lee, pay all costs incurred on this application.

****

Appendix D

NO. 95-0087) April 27, 1995
)
BILLY L. LEE)
)
v.)From MONTGOMERY
)County, 9th District
)
SARAH RENAE M. WALTON)

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

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UNITED STATES CODE ANNOTATED
TITLE 10. ARMED FORCES
SUBTITLE A--GENERAL MILITARY LAW
PART II--PERSONNEL
CHAPTER 71--COMPUTATION OF RETIRED PAY

Current through P.L. 104-3, approved 3-7-95

Sec. 1408. Payment of retired or retainer pay in compliance with court orders

(a) Definitions.--In this section:

(1) The term "Court" means--

(A) any court of competent jurisdiction of any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands;

(B) any court of the United States (as defined in section 451 of title 28) having competent jurisdiction; and

(C) any court of competent jurisdiction of a foreign country with which the United States has an agreement requiring the United States to honor any court order of such country.

(2) The term "court order" means a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement incident to such

previously issued decree), which--

(A) is issued in accordance with the laws of the jurisdiction of that court;

(B) provides for--

(i) payment of child support (as defined in section 462(b) of the Social Security Act (42 U.S.C. 662(b)));

(ii) payment of alimony (as defined in section 462(c) of the Social Security Act (42 U.S.C. 662(c))); or

(iii) division of property (including a division of community property); and

(C) in the case of a division of property, specifically provides for the payment of an amount, expressed in dollars or as a percentage of disposable retired pay, from the disposable retired pay of a member to the spouse or former spouse of that member.

(3) The term "final decree" means a decree from which no appeal may be taken or from which no appeal has been taken within the time allowed for taking such appeals under the laws applicable to such appeals, or a decree from which timely appeal has been taken and such appeal has been finally decided under the laws applicable to such appeals.

(4) The term "disposable retired pay" means the total monthly retired pay to which a member is entitled less amounts which--

(A) are owed by that member to the United States for previous overpayments of retired pay and for recoupments required by law resulting from entitlement to retired pay;

(B) are deducted from the retired pay of such member as a result of forfeitures of retired pay ordered by a court-marital or as a result of a waiver

of retired pay required by law in order to receive compensation under title 5 or title 38;

(C) in the case of a member entitled to retired pay under chapter 61 of this title, are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list); or

(D) are deducted because of an election under chapter 73 of this title to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired pay is being made pursuant to a court order under this section.

[(E) and (F) Redesignated (C) and (D)]

(5) The term "member" includes a former member entitled to retired pay under section 1331 of this title.

(6) The term "spouse or former spouse" means the husband or wife, or former husband or wife, respectively, of a member who, on or before the date of a court order, was married to that member.

(7) The term "retired pay" includes retainer pay.

(b) Effective service of process.--For the purposes of this section--

(1) service of a court order is effective if--

(A) an appropriate agent of the Secretary concerned designated for receipt of service of court orders under regulations prescribed pursuant to subsection (i) or, if no agent has been so designated, the Secretary concerned, is personally served or is served by

certified or registered mail, return receipt requested;

(B) the court order is regular on its face;

(C) the court order or other documents served with the court order identify the member concerned and include, if possible, the social security number of such member; and

(D) the court order or other documents served with the court order certify that the rights of the member under the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U.S.C.App. 501 et seq.) were observed; and

(2) a court order is regular on its face if the order--

(A) is issued by a court of competent jurisdiction;

(B) is legal in form; and

(C) includes nothing on its face that provides reasonable notice that it is issued without authority of law.

(c) Authority for court to treat retired pay as property of the member and spouse.--(1) Subject to the limitations of this section, a court may treat disposable retired pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court. A court may not treat retired pay as property in any proceeding to divide or partition any amount of retired pay of a member as the property of the member and the member's spouse or former spouse if a final decree of divorce, dissolution, annulment, or legal separation (including a court ordered, ratified, or approved property settlement incident to such decree) affecting the member and the member's

spouse or former spouse (A) was issued before June 25, 1981, and (B) did not treat (or reserve jurisdiction to treat) any amount of retired pay of the member as property of the member and the member's spouse or former spouse.

(2) Notwithstanding any other provision of law, this section does not create any right, title, or interest which can be sold, assigned, transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse. Payments by the Secretary concerned under subsection (d) to a spouse or former spouse with respect to a division of retired pay as the property of a member and the member's spouse under this subsection may not be treated as amounts received as retired pay for service in the uniformed services.

(3) This section does not authorize any court to order a member to apply for retirement or retire at a particular time in order to effectuate any payment under this section.

(4) A court may not treat the disposable retired pay of a member in the manner described in paragraph (1) unless the court has jurisdiction over the member by reason of (A) his residence, other than because of military assignment, in the territorial jurisdiction of the court, (B) his domicile in the territorial jurisdiction of the court, or (C) his consent to the jurisdiction of the court.

(d) Payments by secretary concerned to spouse or former spouse.--(1) After effective service on the Secretary concerned of a court order providing for the payment of child support or alimony or, with respect to a division of property, specifically providing for the payment of an amount of the disposable retired pay from a member to the spouse or

a former spouse of the member, the Secretary shall make payments (subject to the limitations of this section) from the disposable retired pay of the member to the spouse or former spouse in an amount sufficient to satisfy the amount of child support and alimony set forth in the court order and, with respect to a division of property, in the amount of disposable retired pay specifically provided for in the court order. In the case of a member entitled to receive retired pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date of effective service. In the case of a member not entitled to receive retired pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date on which the member first becomes entitled to receive retired pay.

(2) If the spouse or former spouse to whom payments are to be made under this section was not married to the member for a period of 10 years or more during which the member performed at least 10 years of service creditable in determining the member's eligibility for retired pay, payments may not be made under this section to the extent that they include an amount resulting from the treatment by the court under subsection (c) of disposable retired pay of the member as property of the member or property of the member and his spouse.

(3) Payments under this section shall not be made more frequently than once each month, and the Secretary concerned shall not be required to vary normal pay and disbursement cycles for retired or retainer pay in order to comply with a court order.

(4) Payments from the disposable retired pay of a member pursuant to this section shall terminate in accordance with the terms of the applicable court order, but not later than the date of the death of the member or the date of the death of the spouse or former spouse to whom payments are being made, whichever occurs first.

(5) If a court order described in paragraph (1) provides for a division of property (including a division of community property) in addition to an amount of child support or alimony or the payment of an amount of disposable retired pay as the result of the court's treatment of such pay under subsection (c) as property of the member and his spouse, the Secretary concerned shall pay (subject to the limitations of this section) from the disposable retired pay of the member to the spouse or former spouse of the member, any part of the amount payable to the spouse or former spouse under the division of property upon effective service of a final court order of garnishment of such amount from such retired pay.

(e) Limitations.--(1) The total amount of the disposable retired pay of a member payable under all court orders pursuant to subsection (c) may not exceed 50 percent of such disposable retired pay.

(2) In the event of effective service of more than one court order which provide for payment to a spouse and one or more former spouses or to more than one former spouse, the disposable retired pay of the member shall be used to satisfy (subject to the limitations of paragraph (1)) such court orders on a first-come, first-served basis. Such court orders shall be satisfied (subject to the limitations of paragraph (1)) out of that amount of

disposable retired pay which remains after the satisfaction of all court orders which have been previously served.

(3)(A) In the event of effective service of conflicting court orders under this section which assert to direct that different amounts be paid during a month to the same spouse or former spouse of the same member, the Secretary concerned shall--

(i) pay to that spouse from the member's disposable retired pay the least amount directed to be paid during that month by any such conflicting court order, but not more than the amount of disposable retired, pay which remains available for payment of such court orders based on when such court orders were effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4);

(ii) retain an amount of disposable retired pay that is equal to the lesser of--

(I) the difference between the largest amount required by any conflicting court order to be paid to the spouse or former spouse and the amount payable to the spouse or former spouse under clause (i); and

(II) the amount of disposable retired pay which remains available for payment of any conflicting court order based on when such court order was effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4); and

(iii) pay to that member the amount which is equal to the amount of that member's disposable retired pay (less any amount paid during such month pursuant to legal process served under section 459 of the Social Security Act (42 U.S.C. 659) and any amount paid during such month

pursuant to court orders effectively served under this section, other than such conflicting court orders) minus--

(I) the amount of disposable retired pay paid under clause (i); and

(II) the amount of disposable retired pay retained under clause (ii).

(B) The Secretary concerned shall hold the amount retained under clause (ii) of subparagraph (a) until such time as that Secretary is provided with a court order which has been certified by the member and the spouse or former spouse to be valid and applicable to the retained amount. Upon being provided with such an order, the Secretary shall pay the retained amount in accordance with the order.

(4)(A) In the event of effective service of a court order under this section and the service of legal process pursuant to section 459 of the Social Security Act (42 U.S.C. 659), both of which provide for payments during a month from the same member, satisfaction of such court orders and legal process from the retired pay of the member shall be on a first-come, first-serve basis. Such court orders and legal process shall be satisfied out of moneys which are subject to such orders and legal process and which remain available in accordance with the limitations of paragraph (1) and subparagraph (B) of this paragraph during such month after the satisfaction of all court orders or legal process which have been previously served.

(B) Notwithstanding any other provision of law, the total amount of the disposable retired pay of a member payable by the Secretary concerned under all court orders pursuant to this section and all legal processes pursuant to section 459 of the Social Security Act (42 U.S.C. 659) with

respect to a member may not exceed 65 percent of the amount of the retired pay payable to such member that is considered under section 462 of the Social Security Act (42 U.S.C. 662) to be remuneration for employment that is payable by the United States.

(5) A court order which itself or because of previously served court orders provides for the payment of an amount which exceeds the amount of disposable retired pay available for payment because of the limit set forth in paragraph (1), or which, because of previously served court orders or legal process previously served under section 459 of the Social Security Act (42 U.S.C. 659), provides for payment of an amount that exceeds the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4), shall not be considered to be irregular on its face solely for that reason. However, such order shall be considered to be fully satisfied for purposes of this section by the payment to the spouse or former spouse of the maximum amount of disposable retired pay permitted under paragraph (1) and subparagraph (B) of paragraph (4).

(6) Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired pay under this section have been made in the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4). Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section in any case in which the maximum amount permitted under paragraph (1) has been paid and under

section 459 of the Social Security Act (42 U.S.C. 659) in any case in which the maximum amount permitted under subparagraph (B) of paragraph (4) has been paid.

(f) Immunity of officers and employees of United States.--(1) The United States and any officer or employee of the United States shall not be liable with respect to any payment made from retired pay to any member, spouse, or former spouse pursuant to a court order that is regular on its face if such payment is made in accordance with this section and the regulations prescribed pursuant to subsection (i).

(2) An officer or employee of the United States who, under regulations prescribed pursuant to subsection (i), has the duty to respond to interrogatories shall not be subject under any law to any disciplinary action or civil or criminal liability or penalty for, or because of, any disclosure of information made by him in carrying out any of his duties which directly or indirectly pertain to answering such interrogatories.

(g) Notice to member of service of court order on secretary concerned.--A person receiving effective service of a court order under this section shall, as soon as possible, but not later than 30 days after the date on which effective service is made, send a written notice of such court order (together with a copy of such order) to the member affected by the court order at his last known address.

(h) Benefits for dependents who are victims of abuse by members losing right to retired pay.--(1) If, in the case of a member or former member of the armed forces referred to in paragraph (2)(A), a court order provides (in the manner applicable to a division of property) for

the payment of an amount from the disposable retired pay of that member or former member (as certified under paragraph (4)) to an eligible spouse or former spouse of that member or former member, the Secretary concerned, beginning upon effective service of such court order, shall pay that amount in accordance with this subsection to such spouse or former spouse.

(2) A spouse or former spouse of a member or former member of the armed forces is eligible to receive payment under this subsection if--

(A) the member or former member, while a member of the armed forces and after becoming eligible to be retired from the armed forces on the basis of years of service, has eligibility to receive retired pay terminated as a result of misconduct while a member involving abuse of a spouse or dependent child (as defined in regulations prescribed by the Secretary of Defense or, for the Coast Guard when it is not operating as a service in the Navy, by the Secretary of Transportation); and

(B) the spouse or former spouse--

(i) was the victim of the abuse and was married to the member or former member at the time of that abuse; or

(ii) is a natural or adopted parent of a dependent child of the member or former member who was the victim of the abuse.

(3) The amount certified by the Secretary concerned under paragraph (4) with respect to a member or former member of the armed forces referred to in paragraph (2)(A) shall be deemed to be the disposable retired pay of that member or former member for the purposes of this subsection.

(4) Upon the request of a court or an eligible spouse or former spouse of a member or former member of the armed forces referred to in paragraph (2)(A) in connection with a civil action for the issuance of a court order in the case of that member or former member, the Secretary concerned shall determine and certify the amount of the monthly retired pay that the member or former member would have been entitled to receive as of the date of the certification--

(A) if the member or former member's eligibility for retired pay had not been terminated as described in paragraph (2)(A); and

(B) if, in the case of a member or former member not in receipt of retired pay immediately before that termination of eligibility for retired pay, the member or former member had retired on the effective date of that termination of eligibility.

(5) A court order under this subsection may provide that whenever retired pay is increased under section 1401a of this title (or any other provision of law), the amount payable under the court order to the spouse or former spouse of a member or former member described in paragraph (2)(A) shall be increased at the same time by the percent by which the retired pay of the member or former member would have been increased if the member or former member were receiving retired pay.

(6) Notwithstanding any other provision of law, a member or former member of the armed forces referred to in paragraph (2)(A) shall have no ownership interest in, or claim against, any amount payable under this section to a spouse or former spouse of the member or former member.

(7)(A) If a former spouse receiving payments under this subsection with

respect to a member or former member referred to in paragraph (2)(A) marries again after such payments begin, the eligibility of the former spouse to receive further payments under this subsection shall terminate on the date of such marriage.

(B) A person's eligibility to receive payments under this subsection that is terminated under subparagraph (A) by reason of remarriage shall be resumed in the event of the termination of that marriage by the death of that person's spouse or by annulment or divorce. The resumption of payments shall begin as of the first day of the month in which that marriage is so terminated. The monthly amount of the payments shall be the amount that would have been paid if the continuity of the payments had not been interrupted by the marriage.

(8) Payments in accordance with this subsection shall be made out of funds in the Department of Defense Military Retirement Fund established by section 1461 of this title or, in the case of the Coast Guard, out of funds appropriated to the Department of Transportation for payment of retired pay for the Coast Guard.

(9)(A) A spouse or former spouse of a member or former member of the armed forces referred to paragraph (2)(A), while receiving payments in accordance with this subsection, shall be entitled to receive medical and dental care, to use commissary and exchange stores, and to receive any other benefit that a spouse or a former spouse of a retired member of the armed forces is entitled to receive on the basis of being a spouse or former spouse, as the case may be, of a retired member of the armed forces in the same manner as if the

member or former member referred to in paragraph (2)(A) was entitled to retired pay.

(B) A dependent child of a member or former member referred to in paragraph (2)(A) who was a member of the household of the member or former member at the time of the misconduct described in paragraph (2)(A) shall be entitled to receive medical and dental care, to use commissary and exchange stores, and to have other benefits provided to dependents of retired members of the armed forces in the same manner as if the member or former member referred to in paragraph (2)(A) was entitled to retired pay.

(C) If a spouse or former spouse or a dependent child eligible or entitled to receive a particular benefit under this paragraph is eligible or entitled to receive that benefit under another provision of law, the eligibility or entitlement of that spouse or former spouse or dependent child to such benefit shall be determined under such other provisions of law instead of this paragraph.

(10)(A) For purposes of this subsection, in the case of a member of the armed forces who has been sentenced by a court-martial to receive a punishment that will terminate the eligibility of that member to receive retired pay if executed, the eligibility of that member to receive retired pay may, as determined by the Secretary concerned, be considered terminated effective upon the approval of that sentence by the person acting under section 860(c) of this title (article 60(c) of the Uniform Code of Military Justice).

(B) If each form of the punishment that would result in the termination of

eligibility to receive retired pay is later remitted, set aside, or mitigated to a punishment that does not result in the termination of that eligibility, a payment of benefits to the eligible recipient under this subsection that is based on the punishment so vacated, set aside, or mitigated shall cease. The cessation of payments shall be effective as of the first day of the first month following the month in which the Secretary concerned notifies the recipient of such benefits in writing that payment of the benefits will cease. The recipient may not be required to repay the benefits received before that effective date (except to the extent necessary to recoup any amount that was erroneous when paid).

(11) In this subsection, the term "dependent child", with respect to a member or former member of the armed forces referred to in paragraph (2)(A), means an unmarried legitimate child, including an adopted child or a stepchild of the member of former member, who--

(A) is under 18 years of age;

(B) is incapable of self-support because of a mental or physical incapacity that existed before becoming 18 years of age and is dependent on the member or former member for over one-half of the child's support; or

(C) if enrolled in a full-time course of study in an institution of higher education recognized by the Secretary of Defense for the purposes of this subparagraph, is under 23 years of age and is dependent on the member or former member for over one-half of the child's support.

(i) Regulations.--The Secretaries concerned shall prescribe uniform

regulations for the administration of this section.

NO. 92-01-00153-CV

IN THE MATTER OF THE MARRIAGE OF	§IN THE DISTRICT § COURT OF §
	§MONTGOMERY COUNTY, § TEXAS
SARAH RENAE M. WALTON AND BILLY L. LEE	§ §9TH/2ND9TH JUDICIAL § DISTRICT

MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT;

COMES NOW BILLY L. LEE, Respondent, and moves for Summary Judgment against Petitioner, SARAH RENAE M. WALTON, and in support thereof, would respectfully show unto the Court:

I.

There are no issues as to any material facts. For the purposes of this motion, Respondent accepts as true that a portion of Petitioner's pleading setting forth the chronological events of marriage and divorce.

II.

The facts of this case are undisputed. On January 7, 1959, Respondent enlisted in the military service, and served until July 31, 1981, the date of his retirement and discharge from military service. Subsequently, he and Petitioner were married on August 3, 1961. The parties were divorced on November 4, 1976. On or about July 31, 1981, Respondent retired from military service. Then, on January 2, 1992, SARAH RENAE M. WALTON, Petitioner, filed the instant cause of action seeking a division or partition of military benefits. It is further undisputed that the divorce decree that was granted on November 4, 1976, in the District Court of Montgomery County, Texas, was issued before June 25, 1981, and did not treat (or reserve jurisdiction to treat) any amount of retired pay of the

member as property of the member and the member-spouse or former spouse.

III.

In support of this motion, Respondent relies on pleadings on file in this cause and the affidavit of BILLY L. LEE that has been filed with the Court in support of this motion. A certified copy of the divorce decree granted on November 4, 1976 is attached hereto and incorporated herein the same as if copied herein verbatim.

IV.

The law is clear and now unequivocable that a Court may not divide or partition military benefits if the initial divorce decree was issued before June 25, 1981, and failed to treat or deal with the military retirements in the initial divorce decree. Respondent is, therefore, entitled to summary judgment as a matter of law.

WHEREFORE, Respondent requests that this matter be set for hearing, with notice to Petitioner, and that upon completion of the hearing, the Court enter judgment that Petitioner take nothing and Respondent recover costs from Petitioner and for such other and further relief to which Respondent is entitled.

Respectfully submitted,

s\ John L. Oxley
JOHN L. OXLEY
Attorney for Respondent
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Madisonville, Texas 77864
(409)348-2601
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NO. 92-01-00153-CV

IN THE MATTER OF THE MARRIAGE OF	§	IN THE DISTRICT COURT OF
	§	MONTGOMERY COUNTY, TEXAS
SARAH RENAE M. WALTON AND BILLY L. LEE	§	9TH/2ND9TH JUDICIAL DISTRICT

FINAL SUMMARY JUDGMENT

On November 10, 1992, the Court heard the motion for summary judgment filed in this cause by BILLY L. LEE, Respondent. All parties appeared by and through their respective counsel. The Court, after examining the pleadings and the summary judgment evidence and hearing the arguments of counsel, is of the opinion and finds that BILLY L. LEE is entitled to summary judgment as follows:

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that Petitioner, SARAH RENAE M. WALTON, take nothing against

Respondent, BILLY L. LEE, and that Respondent recover all costs in his behalf expended of and from Petitioner, for which let execution issue.

All relief requested and not expressly granted is denied.

SIGNED this 11th day of December, 1992.

s/ Jim Keeshan
JUDGE PRESIDING

APPROVED AS TO FORM:

s/ John L. Oxley
JOHN L. OXLEY

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(2)

No. 95-219

Supreme Court, U.S.
FILED
AUG 25 1995
CLERK

In The

Supreme Court of the United States

October Term, 1995

BILLY L. LEE,
Petitioner

v.

SARAH RENAE M. WALTON,
Respondent

In Response to a
Petition for a Writ of Cetiorari
To the Court of Appeals for the
Ninth District of Texas at
Beaumont, Texas

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Where a partition suit necessary to complete division of community property consisting of military retirement pay unaddressed by a previous divorce degree is brought exclusively pursuant to Texas law, does 10 U.S.C. § 1408(c)(1) apply to preempt the operation of Texas law where, as here, Federal law has not been invoked in bringing suit, and the Texas Supreme Court in Berry v. Berry, 786 S.W. 2d 672 (Tex. 1990), has declared that the USFSPA shall not be applied retroactively in Texas?
2. Where the parties' marital property settlement contract is incorporated into their divorce decree but wholly fails to address Petitioner's military retirement pay, thereby rendering it community property in which each spouse has accrued vested rights during marriage under Texas law, does the continuation of these rights in a constructive trust or tenancy in common created by operation of Texas law, and only extinguishable through partition, treat or reserve jurisdiction to treat said pay for the purposes of

10 U.S.C. § 1408(c) (1)?

3. Does Petitioner's desired application of 10 U.S.C. § 1408 violate either the Fifth and Fourteenth Amendments of the United States Constitution, or Article I, § 3a of the Texas Constitution, as this issue has been preserved on appeal by Respondent?

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No. 95-219

In The

Supreme Court of the United States

October Term, 1995

BILLY L. LEE,
Petitioner

v.

SARAH RENAE M. WALTON,
Respondent

The Respondent, Renae Walton, respectfully requests that this Honorable Court deny the petition for writ of certiorari, seeking review of the Texas Ninth Court of Appeals opinion in this case. That opinion is reported as Walton v. Lee, 888 S.W.2d 604 (Tex. App. Beaumont 1994, writ ref'd.).

STATEMENT OF THE CASE

While Petitioner's review of procedural history seems apt, the fact that this is an appeal from a pre-trial summary judgment hearing conducted without testimony indicates that Respondent's sworn affidavit attached to her "Response to Motion for Summary Judgment and Cross-Action for Partial Summary Judgment," should not be overlooked as to the following facts:

> "...When we divorced in 1976, Bill insisted upon retaining a lawyer for us both. Bill insisted on handling everything and on paying the lawyer to prepare the divorce papers. Bill told me that I would 'go along with the way he wanted the divorce or you'll be sorry because you know what a son of a b-- -- I can be.'...
>
> "...I went to the lawyer's office only once that I remember, to sign the divorce papers. I did not have independent legal advice before signing said papers. I also did not appear in court during the dissolution proceeding."

Respondent's full affidavit is appended.

Further, Respondent has preserved argument on another point of error not reviewed by the Ninth Court of Appeals, which revolved around whether Petitioner's proposed application of Section 1408(c)(1) will survive "equal rights" and "equal protection"

scrutiny under the Texas and Federal Constitutions. That issue is once again raised herein.

REASONS FOR DENYING PETITIONER'S APPLICATION FOR CERTIORARI

This appeal arises from a pre-trial hearing on a Motion for Summary Judgment. Under Rule 166a., Texas Rules of Civil Procedure (1992 ed.), a party is entitled to summary judgment if:

> "...the pleadings, admissions, affidavits, stipulations...on file at the time of the hearing,...show that, except as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the issues expressly set out in the motion...or any other response..."

In this case, Respondent replied to Petitioner's Motion for Summary Judgment with her own counter-motion entitled, "Response to Motion for Summary Judgment and Cross-Action for Partial Summary Judgment," which is appended hereunto. Although the trial court gave judgment for Petitioner, the Ninth Court of Appeals of Beaumont, Texas, reversed this decision. Respondent's Motion was a part of the record before the Beaumont court on appeal.

For the sake of brevity, Respondent's arguments and authorities contained in her "Reply to Application for Writ of Error" before the Texas Supreme Court, which is appended below, are

incorporated by reference as if fully set forth at length herein. Said Reply Brief emphasizes the following arguments which are repeated here in opposition to certiorari:

A.

The Overriding Purpose of the USFSPA Is to Restore the Former Operation of the State Law of Marital Property Partition, and Not to Preempt It.

1) Post divorce partition of retirement benefits was sought in both Respondent's original and amended pleadings (on which judgment was had) exclusively pursuant to Texas law, and not pursuant to 10 U.S.C. § 1408(c), thus clearly distinguishing Knowles v. Knowles, 811 S.W.2d 709 (Tex. App. Tyler 1991, no writ), and precluding partition suit. Not § 1408, but rather traditional Texas law, itself unchanged as to community property unaddressed by a divorce decree since 1852, and recently codified as subchapter F of Chapter 3 of the Texas Family Code, was invoked to re-open the 1976 contractual property settlement incorporated into the parties' divorce decree. Texas Family Code Ann. § 3.633(d) and 3.92(a) (Vern. Supp. 1992); Busby v. Busby, 457 S.W. 2d 551 (Tex. 1970); Wright v. Wright, 7 Tex. 526 (1852).

It is well settled that the legislative purpose for enactment

of the Uniformed Services Former Spouses' Protection Act (hereinafter USFSPA), was to restore state law to what it had been before the McCarty v. McCarty decision, and the Legislative History cited by Petitioner supports the view that the 1990 revision was only aimed at re-openings using Section 1408 like an independent cause of action, and not at re-openings under restored state law. Sen. Rep. No. 97-502, adopted by House Rep. No. 97-749 at 128 Cong. Rec. 21235, 21239, 21283 (U.S. House of Representatives - Aug. 16, 1982), and as cited in Grier v. Grier, 731 S.W.2d 931, 932 (Tex. 1987).

B.

Statutory Construction of § 1408 Must be in Accord with State Law.

1) By operation of Texas law, the divorce decree was not a final decree of divorce for purposes of 10 U.S.C. § 1408(c):

a) First, the decree must be "issued in accordance with the laws" of the state where the court sits. 10 U.S.C. § 1408(a)(2). Here, the court order was not final because it did not effect a complete division of the parties' community estate. See Texas Fam. Code Ann. § 3.63 (Vern. Supp. 1992).

b) Further, under Texas law, Respondent still possessed the right to the functional equivalent of an appeal "taken within the time allowed for taking such appeals under the laws applicable to such appeals..." 10 U.S.C. § 1408(a)(3) (West Supp. 1992). In Morgan v. Horton, 675 S.W.2d 602 (Tex. App. Dallas 1984, no writ), such a division was allowed 26 years after the divorce. Texas law is that spouses become constructive trustees in a tenancy in common of undivided property. Since jurisdiction is in equity, laches apply. See Tex. Fam. Code Ann. § 3.90(c) (Vern. Supp. 1992).

C.

Preemption Not Shown.

Petitioner has not shown that § 1408(c)(1) meets the requirement that, for a statute to preempt state law, Congress must have "positively required preemption by direct enactment." Hisquierdo v. Hisquierdo, 439 U.S. 572, 581, 99 S.Ct. at 808, 59 L.Ed. 2d at 11 (1979). Revised § 1408 (c)(1) does not contain explicit 'direct and positive conflict' language such as that found in 29 U.S.C. § 667(a) or 42 U.S.C. § 2000e-7. Logically, then, Congress was not trying to preempt the state law it had just

restored by the same enactment, but rather was only trying to curb its own dog. See Zimmerman, Jos., Federal Preemption: The Silent Revolution (Iowa State U. Press, Ames., Iowa, 1991), at pages 88-89.

1) There are several additional reasons against preemption:

a) If § 1408 does facially conflict with Texas Family Code, chapter 3, subchapter F, then as a matter of construction, every effort must be made to reconcile these statutes before the estate law can be declared preempted, particularly where domestic relations is traditionally a state domain. Barber v. Barber, 62 U.S. 582, 584, 16 L.Ed. 226 (1859).

b) Part of Texas theory which enables broad, equitable-type relief is that the division order is not res judicata as to any property the court has not assumed jurisdiction over because it was not disclosed when the marital relationship was dissolved. Ralls v. Ralls, 256 S.W. 688, 695 (Tex. Civ. App. Amarillo 1923, writ dism'd.); Thompson v. Thompson, 500 S.W.2d 203, 208-09 (Tex. Civ. App. Dallas 1973, no writ). Being integral to the state's law of res judicata, therefore, this law of incompletely divided estates

should not be subject to preemption.

c) Texas law imputes constructive fraud to the non-disclosing spouse, since he is also a fiduciary or trustee for his spouse, - Texas spouses being incapable of bargaining at arm's length. McMurray v. McMurray, 4 S.W. 357, 360 (Tex. 1887); McFarland v. Reynolds, 513 S.W.2d 620, 625 (Tex. Civ. App. Corpus Christi 1974, no writ). This is particularly so where, as here, the undisclosed community property is, under Texas law, sole management community property. See Massey v. Massey, 807 S.W.2d 391, 402 (Tex. App. Houston [1st Dist.] 1991, no writ).

Here, the facts recited in Respondent's supporting affidavit attached to her Response to Petitioner's Motion for Summary Judgment also reflects that Respondent was subjected to duress since she did not have any independent legal advice, signed the decree at Petitioner's lawyer's office, and waived appearance at the trial court. In Texas, the presence of such signs of duress can raise an issue of fraud. Moor v. Moor, 63 S.W. 347 (Tex. Civ. App. 1901, writ ref'd.). The general rule that fraud is also a domain traditionally relegated to the states is yet another reason which

mitigates against preemption here.

d) Further, because the parties' divorce settlement is contractual, - and even if it was not, - Texas law still makes Respondent's rights in the undivided property vested rights similar to a moiety, Section 1408(c)(1) cannot be given the meaning supplied to it by Petitioner without preempting Texas Constitution, Article I, § 16, which provides:

> No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made.

Because Petitioner's requested application of Section 1408 creates a direct conflict between the Supremacy clause of the U.S. Constitution and this provision of the Texas Constitution, every effort at reconciliation of Federal and state law must be made before this result can be reached.

This Conclusion becomes inescapable upon review of these authorities:

1) Respondent's rights in the undivided community property are vested rights. Hopkins v. Bacon, 282 U.S. 122, 125, 51, S.Ct., 62, 75 L.Ed. 249 (1930); Taggart v. Taggart, 552 S.W. 2d 422

(Tex. 1977);

2) Texas law in effect on the date of signing of any Texas contract becomes an implied term thereof, Anderson-Berney Realty Co. v. Soria, 41 S.W.2d 279, 281 (Tex. Civ. App. Fort Worth 1931), aff'd., 67 S.W.2d 222 (Tex. 1933); and Texas contract law is used in construing marital property settlements incorporated in judgments. McGoodwin v. McGoodwin, 671 S.W.2d 880 (Tex. 1984).

3) Retroactive application of § 1408 to deprive Respondent's vested community property rights would violate Article I, § 16, of the Texas Constitution. Please compare W. B. Worthen Co. v. Kavanaugh, 295 U.S. 56, 55 S.Ct. 555 (1935) with Mellinger v. City of Houston, 3 S.W. 249, 253 (Tex. 1887).

D.

The Rationale of the Ninth Court of Appeals.

Respondent's position has always been that Texas courts reserved jurisdiction to treat retirement benefits unaddressed by a decree by operation of state law. Apparently, the Ninth Court of Appeals substituted the term "automatically," for the briefed phrase "by operation of state law," since the former term was never

briefed. The Ninth Court's wording apparently comes from a law review article then before the Court, which distinguished Petitioner's Johnson v. Johnson and Dunham v. Dunham cases in concluding (at p. 946 and 961) that a court, by "converting a community interest into military retirement benefits into a tenancy in common," (automatically) 'treats' such property. Reppy, William A., The 1990 U.S.F.S.P.A. Amendment: No Bar to Recognition of Tenancy in Common Interests Created by Pre-McCarty Divorces that Fail to Divide Military Retirement Benefits, 29 Idaho L. Rev. 941, 946, 961 (1992-93). The Johnson case is also distinguished (at 948) as not coming from a community property state where vested rights in retirement benefits accrue pre-divorce. (Please see excerpts in the Appendix.)

E.

Argument Reserved Under Supreme Court Rule 15.1.

Respondent also provides notice that she has timely preserved, on each successive appeal, the right to argue the Constitutional issue raised before the Ninth Court of Appeals as Point of Error No. II. Because no Texas court has yet passed upon it, this issue may ultimately need to be remanded for further

review in order to be ripe for adjudication in the United States Supreme Court. This Point reads as follows:

> THE TRIAL COURT ERRED BECAUSE ITS APPLICATION OF 10 U.S.C. § 1408 USED TO GRANT SUMMARY JUDGMENT ARBITRARILY CREATES TWO UNDERINCLUSIVE GROUPS IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 3a OF THE TEXAS CONSTITUTION.

If, as Petitioner contends, § 1408 creates two groups defined only by whether their divorce decrees came before or after June 25, 1981, and concommitantly denies marital property rights vested by virtue of Texas law to those divorced before that date, it is both underinclusive, and arbitrary as applied, in violation of the Fourteenth Amendment of the United States Constitution and Article I, § 3a of the Texas Constitution. (Section 3a is the Texas Equal Rights Amendment).

Frontiero v. Richardson, 411 U.S. 677 (1973) held that another provision of Title X of the United States Code dealing with similar subject matter violated the "equal protection" clause of the Fourteenth Amendment because it similarly discriminated against military wives. Because the divorce in the instant case occurred

in 1976, and the Respondent was a military wife from 1961 until divorce, it can be assumed that Frontiero's finding (411 U.S. at 681) that 99% of military wives were then female, reinforces Respondent's argument that Petitioner's desired application of § 1408 would necessarily require Frontiero-typed discrimination.

Furthermore, under Rule 166a, T.R.C.P., Petitioner had to eliminate both Federal and state Constitutional provisions in order to prevail. Article I, § 3a, Tex. Const., reads:

> Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin. This amendment is self-operative.

Because Article I, § 3a is both self-operative and requires 'strict scrutiny,' Section 1408(c)(1)'s obvious underinclusion of military wives would render it prima facie void. See In re McLean, 725 S.W.2d 696, 698 (Tex. 1987). Of course, a conflict with the Supremacy clause would necessitate the application of Constitutional rules of construction with either Amendment.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Sarah Renae M. Walton

SARAH RENAE M. WALTON
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(713) 476-5883

No. 95-219

In The

Supreme Court of the United States

October Term, 1995

BILLY L. LEE,
Petitioner

v.

SARAH RENAE M. WALTON,
Respondent

RESPONDENT'S CERTIFICATE OF SERVICE

I do hereby certify that on this date, August 23, 1995, and pursuant to Supreme Court Rules 29.3 and 29.5(b), I have served a true and correct copy of the attached Respondent's Brief in Opposition to Petition for a Writ of Certiorari on each party to the above proceeding, or on that party's counsel, and on every other person required to be served, and particularly on counsel for Petitioner, Mr. Alan L. Tinsley, 201 South Madison, P.O. Box 160, Madisonville, Texas, 77864, by depositing an envelope containing three (3) copies of said Brief in the United States mail properly addressed to each of them and with first class postage, certified mail, return receipt requested, prepaid.

Respectfully submitted,

Sarah Renae M. Walton

SARAH RENAE M. WALTON

SUBSCRIBED AND SWORN TO BEFORE ME ON THE 2nd day of August, 1995, to certify which witness my hand and official seal.

Pat Norris

NOTARY PUBLIC in and for THE STATE OF TEXAS

My commission expires: 5/1/96

Printed name of notary: Pat Norris

PAT NORRIS
MY COMMISSION EXPIRES
May 1, 1996

APPENDICES

1. Respondent's Reply to Application for Writ of Error Before Texas Supreme Court

2. Response to Motion for Summary Judgment & Cross-Action for Partial Summary Judgment

3. Petitioner's First Amended Original Petition for Division of Community Property

No.

IN THE

SUPREME COURT OF TEXAS

BILLY L. LEE,
Petitioner

vs.

SARAH RENAE M. WALTON
Respondent

On Appeal from the Court of Appeals
for the Ninth Supreme Judicial District of Texas
at Beaumont, Texas

REPLY TO APPLICATION FOR WRIT OF ERROR

Submitted by:
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Attorneys for Respondent

February 3, 1995

No. _____

IN THE

SUPREME COURT OF TEXAS

BILLY L. LEE,
Petitioner

vs.

SARAH RENAE M. WALTON
Respondent

REPLY TO APPLICATION FOR WRIT OF ERROR

TO THE HONORABLE SUPREME COURT OF TEXAS:

Sarah Renae Walton, Petitioner in the District Court, Appellant in the Ninth District Court of Appeals, and the Respondent herein, respectfully submits this Brief. This case began as an appeal from the 9th-2nd/9th District Court, Montgomery County, Texas, the Honorable Judge James Keeshan sitting in the absence of Judge John C. Martin, in Cause No. 92-01-00153-CV. On December 1, 1994, the Ninth District Court of Appeals reversed the trial court

and entered Judgment in favor of Respondent, in No. 09-93-018CV.

For clarity, reference to the parties is by "Respondent," designating Renae Walton, and "Petitioner," designating Bill Lee.

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STATEMENT OF THE NATURE OF THE CASE

Respondent's uncontroverted Summary Judgment proof, which is attached to her pleadings as a sworn affidavit, states:

> "When we divorced in 1976, Bill insisted upon retaining a lawyer for us both. Bill insisted on handling everything and on paying the lawyer to prepare the divorce papers. Bill told me that I would 'go along with the way he wanted the divorce or you'll be sorry because you know what a son of a b--- I can be.' /_Expletive deleted_/ (Also:) "...I then knew nothing of his pension rights nor did he ever mention it." (Further:) "I went to the lawyer's office only once that I remember, to sign the divorce papers. I did not have independent legal advice...I also did not appear in court...." (Transcript, at page

Since the point of error leading to reversal reads: "THE TRIAL COURT ERRED IN GRANTING APPELLEE'S MOTION FOR SUMMARY JUDGMENT," Petitioner's statement of the case is incomplete to the extent that it omits these or other issues found in the affidavits.

Because both parties concede that the retirement plan was undisclosed and went unaddressed by the decree, the Court of Appeals correctly held that, for purposes of 10 U.S.C. § 1408, Texas law "treats" or "reserves jurisdiction to treat" military retirement pay constituting community property undivided at

divorce by operation of law. Hence, Petitioner's Knowles case is not in conflict with the decision being appealed, because Knowles (811 S.W.2d at 711) was an attempt to use § 1408 to re-divide property already awarded by a divorce decree. Further, the Respondent here was seeking relief exclusively via the operation of Texas law, as the Uniformed Services Former Spouses Protection Act originally intended, since it was designed to restore state law an integral whole both before and after the McCarty case. Respondent respectfully submits that this basic purpose of the U.S.F.S.P.A. has not been changed.

ARGUMENT AND AUTHORITIES AGAINST PETITIONER'S POINT OF ERROR

Partition sought via Texas, not Federal, law

Respondent's pleadings seek recovery exclusively under Texas law, seeking statutory partition under Texas Family Code § 3.92(a) (Vernon's 1993), and alternatively, equitable partition pursuant to Harrell v. Harrell, 692 S.W.2d 876 (Tex. 1985). Not only was subchapter F of Family Code chapter 3 made retroactive by Acts 1989, 71st leg., ch. 371, § 10(b), but also Texas Family Code § 3.633(d) (Vernon's 1993) made subchapter F directly applicable to "undivided pension, retirement, annuity, or other financial plan."

For this simple reason, the Ninth Court of Appeals has correctly held in the instant case that:

> We hold that under Texas law the courts automatically 'treat (or reserve jurisdiction to treat) any amount of retired pay of the member' by virtue of the laws governing ownership of undivided property, and subsequent partition is not precluded by federal law. (slip op, p. 3)

Analysis of 10 U.S.C. § 1408(c)(1) begins, in pertinent, part:

> A court may not treat retired pay as property in any proceeding to divide or partition any amount of

> retired pay...if a final decree of divorce,...(including...property settlement incident to such decree)...(A) was issued before June 25, 1981, and (B) did not treat (or reserve jurisdiction to treat) any amount of retired pay (emphasis added).

The terms emphasized in § 1408(c)(1), above, are, we contend, defined in 10 U.S.C. § 1408(a), which reads in pertinent part:

> 1) The term 'court order' means a final decree of divorce..., which–
>
> (A) is issued in accordance with the laws of the jurisdiction of that court;
>
> (B) provides for–
> division of property (including a division of community property); and
>
> (C) in the case of a division of property, specifically provides for the payment of an amount,..., from the...retired pay...to the former spouse of that member.

10 U.S.C. § 1408(a)(3) adds yet another wrinkle:

> The term 'final decree' means a decree from which no appeal may be taken or from which no appeal has been taken within the time allowed for taking such appeals under the laws applicable to such appeals,....

10 United States Code Annotated, § 1408 (West Supp. 1992). Hence, the USFSPA itself recognizes that the changes wrought in the post-McCarty era were unforeseeable by state courts in the 1970's by defining a final decree to include a division of retirement

pay, in order for § 1408 to apply.

The Operation of Texas Law Coincides with the State's Interest in Preventing Fraud

Under Texas law, the community estate must be completely divided for the decree to be "in accordance with the laws of the state," and concommitantly capable of finality as to the property division. Otherwise, a community asset unaddressed by a decree is treated as being undisclosed by its managing spouse, since spouses do not bargain at arm's length, and share a type of fiduciary relationship. Non-disclosure being tantamount to fiduciary fraud, a constructive trust is imposed on undivided property to effectuate the State's interest in preventing fraud and deter future wrongdoing. McMurray v. McMurray, 4 S.W. 357, 360 (Tex. 1887); McFarland v. Reynolds, 513 S.W.2d 620, 625 (Tex. Civ. App. Corpus Christi 1974, no writ). Accord: Kuehn v. Kuehn, 232 S.W. 918, 925 (Tex. Civ. App. Austin (1921), aff'd., 242 S.W. 719 (Tex. Comm'n App., Sect. A, 1922, judg't. adopted); Carnes v. Meador, 533 S.W. 2d 365, 370 (Tex. Civ. App. Dallas 1975, writ ref'd. n.r.e.).

Texas courts from 1852 forward have consistently held that

undivided community property becomes a tenancy in common held by both spouses, with failure of a decree to address an item to be imputed to the non-disclosing spouse as a matter of law, thereby abrogating limitations by creating an equitable or constructive trust for the innocent spouse. Harrell v. Harrell, 692 S.W.2d 876 (Tex. 1985); Busby v. Busby, 457 S.W.2d 551 (Tex. 1970); Whetstone v. Coffey, 48 Tex. 269 (1897); Kirkwood v. Domnan, 16 S.W. 428 (Tex. 1891); McMurray v. McMurray, 4 S.W. 357 360 (Tex. 1887); Wright v. Wright, 7 Tex. 526, 533-34 (1852). See Ex parte Preston, 347 S.W.2d 938, 940 (Tex. 1961).

Hence, Texas law also holds that a divorce decree is not res judicata as to community property it has not divided. Busby v. Busby, supra; Dessommes v. Dessommes, 505 S.W.2d 673, 676 (Tex. Civ. App. Dallas 1973, writ ref'd. n.r.e.); Moreno v. Alejandro, 775 S.W.2d 735 (Tex. App. San Antonio 1989, writ denied); Wilson v. Wilson, 507 S.W. 2d 916, 917 (Tex. Civ. App. Houston /_1st Dist./ 1974, no writ).

The rationale generally stated is that the property has not been brought within the jurisdiction of the court, and thus has not

been adjudicated by the initial order. Thompson v. Thompson, 500 S.W.2d 203, 208-209 (Tex. Civ. App. 1973, no writ); Ralls v. Ralls, 256 S.W. 688, 695 (Tex. Civ. App. Amarillo 1923, writ dism'd.). Accord: Morrison v. Rathmell, 650 S.W.2d 145, 151 (Tex. Civ. App. Tyler 1983, writ dism'd.). This is why the Court of Appeals is correct that a Texas court retains jurisdiction over an undivided asset by operation of law.

Equally, if the property settlement agreement divides specified items but contains no residuary clause, undivided items remain in a tenancy in common. Ex parte Williams, 330 S.W.2d 605 (Tex. 1960); Keller v. Keller, 141 S.W.2d 308 (Tex. Comm. App. 1940, op. adopted).

Although Petitioner states that Respondent cites no cases on this point, pages 16-17 of Appellant's Brief before the Court of Appeals is replete with cases such as those cited above.

Section 1408(c)(1) Cannot Mean What Petitioner Says It Means

In both Grier v. Grier, 731 S.W.2d 931, 932 (Tex. 1987) and Trahan v. Trahan, 682 S.W.2d 332, 335 (Tex. App. Austin 1984, writ ref'd. n.r.e.), dism'd. for want of fed. question, 476 U.S. 1002

(1986), the Court quotes from the Legislative History of the Uniformed Services Former Spouses Protection Act (or USFSPA), specifically from Senate Report No. 97-502:

> ...Congress enacted USFSPA with the intent to 'restore the law to what it was when the courts were permitted to apply State divorce laws to military retired pay.'

Grier v. Grier, 731 S.W.2d 931 (Tex. 1987), at 932.

Simply put, if the pervasive purpose of the USFSPA was to abolish the effects of the U.S. Supreme Court's McCarty v. McCarty decision and to restore the operation of state law to what it had been prior to the decision date of McCarty (June 26, 1981), specifically by making the Act retroactive to June 25, 1981, then Texas law necessarily must govern property divisions retroactively without interruption. Obviously, Respondent's action brought under resurrected Texas law would not be within the purview of a Federal statute designed to eliminate the effects of Federal law. Nor should a 1990 amendment of a subsection enacted as a rider to a Defense appropriations bill change the pervasive purpose of the USFSPA as originally enacted, without the part swallowing the whole.

Nor can Petitioner's mere incantations prove the elements of Federal preemption. Petitioner, as Movant for summary judgment, had to expressly present and conclusively prove all the essential elements of this affirmative defense. Montgomery v. Kennedy, 669 S.W.2d 309, 310-11 (Tex. 1984).

Whenever a Federal statute conflicts directly with a state statute in an area of law traditionally relegated to the states, constitutional principles of construction require that every effort be made at reconciliation before declaring the state law invalid. Domestic relations is such a traditional state domain. See Sosna v. Iowa, 419 U.S. 393 (1975); Barber v. Barber, 62 U.S. 582, 584, 16 L.Ed. 226 (1859).

Hence, with state domestic relations law, inquiry is limited to whether Congress has "positively required preemption by direct enactment." Hisquierdo v. Hisquierdo, 439 U.S. 572, 581, 99 S.Ct. at 808, 59 L.Ed. 2d at 11 (1979). This means that 'direct and positive conflict' language must appear in Section 1408(c)(1) to satisfy Hisquierdo. See English v. General Electric Co., 496 U.S. 72, 110 S.Ct. 2270, 110 L.Ed. 2d 65, 74 (1990); Savings and Profit

Sharing Fund of Sears Employees v. Gage, 717 F.2d 1038, 1041-44 (7th Cir. 1983). Statutes which contain such language include: 18 U.S.C. § 927; 42 U.S.C. § 2000e-7; 29 U.S.C. § 667(a).

Thus, unlike the situation in Mansell v. Mansell, 490 U.S. 581 (1989), there is here clear evidence that reading the language literally would thwart the obvious purposes of the Act. Further, a mere conflict in words is insufficient for preemption; the state law must do "major damage to a clear and substantial federal interest." See In re McMeeken, 117 B.R. 642, 644 (D. Kan. 1990); Leisure v. Leisure, 589 N.E.2d 1163, 1171-73 (Ind. App. 1992).

Moreover, Berry v. Berry, 786 S.W.2d 672 (Tex. 1990), states at p. 673:

> ...The court of appeals apparently determined that retroactive application of the USFSPA to a final divorce decree was a requirement because Mansell permitted modification of a property settlement that had become final prior to the statute's enactment. The Court of Appeals failed to observe that the result in Mansell was based on a determination by the California Court of Appeals that it was appropriate, under California law, to reopen the final settlement order. 109 S.Ct. at 2027 n.5. Mansell does not dictate a similar result under Texas law. The Supreme Court explicitly left the question of retroactive application of the USFSPA to state courts. The subsequent adoption of the USFSPA

cannot be used to collaterally attack the Berry's final divorce decree.

Berry also holds that, under Mansell, Texas has opted not to make the provisions of the USFSPA retroactive (at 673).

Hence, Knowles v. Knowles, 811 S.W.2d 709 (Tex. Civ. App. Tyler 1991, no writ), must be distinguished, since it is a case which employer 10 U.S.C. § 1408 like a derivative cause of action to re-open a 1975 divorce which, on its face, "clearly awarded" the "community property interest in...retirement benefits" to the military spouse (Knowles, supra, at 711). The opening sentence of the Knowles opinion states that a partition suit was filed for a division "as authorized by 10 U.S.C. § 1408." Hence Knowles is consistent with Berry v. Berry, supra, with pre-existing state law, and with Petitioner's excerpt from the 1990 Legislative History objecting to the use of § 1408 to reopen cases. Petitioner's position that state law continuity and operation is not restored by the USFSPA, but rather abolished, is not.

In Texas, the Court Reserves Jurisdiction to Treat Omitted Items by Operation of Law

In the Court of Appeals, Respondent argued both that the

jurisdiction to treat retired pay unaddressed by a Texas decree is reserved by operation of law and that such a decree is not a final order, for purposes of 10 U.S.C. § 1408(c)(1). This construction was also based on definitions contained in 10 U.S.C. § 1408(a)(2)(A) and (3), since, to become "final" under § 1408, an order must be "issued in accordance with the laws of the jurisdiction of that court," and the term "final decree" is ultimately defined as an order from which an appeal may no longer be taken "within the time allowed...under the laws applicable to such appeals..."

The following appears to be the most persuasive statement of Respondent's argument, which begins by addressing Petitioner's Dunham v. Dunham (La. App. 1992) case specifically:

> Intermediate appellate courts in California and Louisiana have held that this 1990 Amendment bars granting relief when a pre-McCarty divorce decree as a matter of law rather than by specific language converted the community interest from community property to tenancy-in-common property or its equivalent. Neither the Louisiana nor California court considered the argument, made by this article, that such a decree does 'treat' the community interest even though it does not specifically refer to it. In my view 'treat' should be given a broad meaning-which would not require that the decree (or

> settlement agreement) mention the community interest in military retirement benefits-for two reasons: (1) the more persuasive part of the legislative history of the 1990 Amendment reveals that Congress was concerned with a re-opening of pre-McCarty divorces that would work a taking in fact of the retired members property rights in future retired pay rather than procedurally implementing ownership rights previously vested in the member's spouse; and (2) the narrow meaning requiring mention of the community interest creates serious constitutional problems of taking the property rights of the member's ex-spouse as well as a denial of equal protection. It is a settle maxim of statutory construction that, when one of two constructions raises substantial problems of unconstitutionality, the other construction is adopted.

Reppy, Wm. A., The 1990 U.S.F.S.P.A. Amendment: No Bar to Recognition of Tenancy in Common Interests Created by Pre-McCarty Divorces that Fail to Divide Military Retirement Benefits, 29 Idaho L. Rev. 941 (1992-93), at p. 946.

According to Professor Reppy's article (at 948), the Johnson v. Johnson and Mings v. Mings cases cited by Petitioner are distinguishable because the states they come from, Alaska and Missouri, are not community property states where vested rights in retirement benefits accrue pre-divorce, but are, instead, common-law jurisdictions. Thus, under the theory advocated by Mings and Johnson (at 948);

> ...the 1990 Amendment applies when the member

and ex-spouse become co-owners as a result of the treatment by the court granting post-divorce relief, rather than being co-owners prior to the granting of post-divorce relief.

This, Professor Reppy believes, is how apparently contradictory rulings from common-law and community property states are to be reconciled.

Reppy then explains how the word 'treat' was intended to be construed:

> On the basis of this legislative history, the narrow construction of 'treat' employed by the Louisiana court in Johnson v. Johnson /_"605 So. 2d 1157 (La. Ct. App. 1992)/ must be rejected as taking from the ex-spouse tenancy-in-common rights previously vested, which the House report writer did not have in mind when proposing a cutback in remedies. A Texas court has given the word 'treat' in the pre-amendment USFSPA its literal, broad meaning: 'to deal with a matter or subject.' By converting a community interest in military retirement benefits into tenancy in common, a court certainly 'deals with' the military property. There is no less 'treating' or 'dealing with' because the judge is not aware of the community assets not brought to the court's attention that are converted into tenancy-in-common properties. Employing the definition of the Texas court rather than that of Louisiana in Dunham more closely achieves the end desired by Congress.

Reppy, Wm. A., opus citerandi, 29 Idaho L. Rev. at p. 961. The Texas case referred to is Southern v. Glenn, 677 S.W.2d 576, at 582 (Tex. App. San Antonio 1984, writ ref'd. n.r.e.).

Professor Reppy also shows that Petitioner's effort to apply the Supremacy clause retroactively cannot work (at 964-967), since a final judgment based on an unconstitutional law still creates enforceable rights. Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371, 84 L.Ed. 329 (1940).

This argument is made more poignant because Respondent's 1976 decree contained a "Property Settlement Agreement" executed by both parties which means that Texas law at the date of execution became an implied term of the agreement governing its construction. McGoodwin v. McGoodwin, 671 S.W. 2d 880, 882 (Tex. 1984). Respondent argued to the Court of Appeals that the obligations of the contract could not be retroactively impaired under either the Texas or United States Constitutions.

In the same vein, retroactive laws which abrogate private, vested rights also violate Article I, § 16, Texas Constitution. Moreover, the fact that, under Texas ganancial system of community property, the non-military spouse's property rights in the other spouse's pension or retirement plan vest immediately

upon their acquisition plausibly distinguishes Texas law from the California practices condemned by Congress:

> ...the only matter...here is whether under the community property system of Texas the wife has a mere expectancy, as she would under the law of California (cf. United States v. Robbins, 269 U.S. 315, 70 L.Ed. 285, 46 S. Ct. 148), or, on the contrary, has a proprietary vested interest in the community property such as makes her an owner of one half of the community income.
>
> ...it is well settle that in Texas the wife has a present vested interest in such property. Arnold v. Leonard,....

Hopkins v. Bacon, 27 F.2d 140, aff'd., 38 F.2d 651 (5th Cir. 1930), aff'd., 292 U.S. 122, 75 L.Ed. 249 (1930). Accord: Taggart v. Taggart, 552 S.W.2d 422 (Tex. 1977).

Finally, Petitioner's policy argument has become a nifty throw-weight to overlook other difficulties with his case. This appeal lies from a summary judgment motion. Respondent's sworn affidavit, offered as summary judgment proof, stated: "I was present at the hearing in the Ninth/Second Ninth District Court on March 3, 1992. I specifically heard Mr. Oxley take the position that I would be entitled to division of two years of Bill Lee's military retirement pay under the Uniformed Services Former Spouses Protection Act, as it is now written." (Tr., p.). Although

opposing counsel, John Oxley, did deny having made this statement in a brief, he did not properly controvert it by a sworn affidavit offered as summary judgment proof as he is required to do for his denial to be admissible under Rule 166a, Texas Rules of Civil Procedures. Therefore, since this material fact was still in dispute, summary judgment was never in order.

Respondent also reserves the right to raise her Point of Error Number II, never addressed by the Ninth Court of Appeals since it was not necessary to the disposition of the case:

THE TRIAL COURT ERRED BECAUSE ITS APPLICATION OF 10 U.S.C. § 1408 USED TO GRANT SUMMARY JUDGMENT ARBITRARILY CREATES TWO UNDERINCLUSIVE GROUPS IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, § 3a OF THE TEXAS CONSTITUTION.

Respectfully submitted,

s/Jack Lawrence
Jack Lawrence
Attorney for Respondent
5570 Winfree
Beaumont, Texas 77705
(409) 833-0894
SBN #12043800

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the above and foregoing Respondent's Reply To Application for Writ of Error has been delivered by placement in the United States Postal mails, certified mail, return receipt requested, addressed to counsel for Petitioner, Mr. Alan L. Tinsley, 201 South Madison, P.O. Box 160, Madisonville, Texas, 77864, on this the 3rd day of February, 1995, in accordance with the applicable rules of the Texas Rules of Civil Procedure and the Texas Rules of Appellate Procedure.

s/ Jack Lawrence

Received and Filed
for Record
at 2:35 p.m
OCTOBER 19 1992
Mrs. Peggy Stevens, District Court
Montgomery County, Texas
By s/EP Deputy

No. 92-01-00153-CV

IN THE MATTER OF THE MARRIAGE OF	§	IN THE DISTRICT COURT OF
	§	MONTGOMERY COUNTY, TEXAS
SARAH RENAE M. WALTON AND BILLY L. LEE	§	9TH/2ND 9TH JUDICIAL DISTRICT

RESPONSE TO MOTION FOR SUMMARY JUDGMENT AND CROSS-ACTION FOR PARTIAL SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES SARAH RENAE M. WALTON, Petitioner, and files this Response to the Motion for Summary Judgment of Billy L. Lee, Respondent herein, and Cross-Action for Partial Summary Judgment, and would show the Court as grounds therefore the following:

I.

Sarah Renae Walton objects and excepts to the evidence of movant as follows:

a. Respondent's First Amended Original Answer, and Motion for Summary Judgment, both filed together, appear directed toward the "Petitioner's Original Petition for Division of

Community Property" filed January 21, 1992, and not to "Petitioner's First Amended Original Petition for Division of Community Property" filed in March, 1992, after leave was granted of record during the March 3, 1992, hearing, to either party to amend his or her pleadings.

b. Granting Respondent's Motion for Summary Judgment would be improper if predicated on 10 U.S.C. § 1408(c)(1), because the USFSPA has only limited applicability to the parties in this case under Texas law, inasmuch as:

1. The Texas Supreme Court, in Berry v. Berry, 786 S.W.2d 672 (Tex. 1990), has declared that the USFSPA will not be retroactive to change the law of the case as to division of military retirement pay, or to mount a collateral attack on a previous order.

2. For the purposes of 10 U.S.C. § 1408(c) Texas 'reserves jurisdiction to treat' military retirement pay not addressed by a previous order or decree by operation of law.

3. Pursuant to Grier v. Grier, 731 S.W. 2d 931 (Tex. 1987), the USFSPA is not preemptive as to assets which can be reached in the hands of Respondent to complete division of community property still undivided as a result of his failure to disclose.

c. An issue of material fact is raised by Respondent's failure to disclose his military retirement pay at the time of the agreed property division, since knowing non-disclosure of sole management community property constitutes a constructive fraud under Texas law. The fact issue here is whether the Respondent is equitably estopped from invoking the USFSPA because he does not have clean hands in this regard.

d. Respondent is not entitled to judgment as a matter of law because his attorney took the position in the March 3, 1992, hearing that Petitioner is entitled to division of two years of Respondent's pay under the USFSPA, as amended in 1990.

e. Respondent's affidavit is the affidavit of an interested witness, since Respondent is a party to this cause.

f. Because Petitioner's community rights in Respondent's retirement pay had vested at divorce as a matter of Texas law, where the non-disclosing spouse was also the managing spouse, Petitioner has a 'protected property interest' in such pay which cannot be extinguished by retroactive application of the USFSPA without violating 'due process' under the Fifth and Fourteenth Amendments of the United States Constitution.

g. Retroactive application of the USFSPA to deprive Petitioner of her interest in her managing but non-disclosing spouse's retirement pay, being an interest already vested at divorce as a matter of Texas law, is a taking without 'just compensation,' in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

h. Retroactive application of the USFSPA, as amended in 1990, to deny Petitioner vested property rights created under Texas law, is a violation of Article I, § 16 of the Texas Constitution.

i. Retroactive application of the USFSPA, as amended in 1990, to deny Petitioner property rights which are created by Texas law, where application of this portion of the USFSPA will single out persons divorced before June 25, 1981, particularly females, to preclude their enjoyment of said rights created under Texas law, constitutes a violation of the Due Process and Equal Protection clauses of the Fifth and Fourteenth Amendments of the United States Constitution, and Article I, § 3a, of the Texas Constitution.

Accordingly, Respondent's Motion for Summary Judgment should be, in all things, denied.

II.

There are genuine issues of material fact that preclude the granting of summary judgment in favor of Respondent Billy Lee, as appear from the pleadings and the affidavits submitted with this Response. More particularly, Petitioner's affidavit, by stating that Respondent insisted on retaining his own lawyer to represent both parties in their divorce, his dominating thereby the preparation of the property settlement agreement, and his securing a waiver of citation of service from Petitioner when she signed the settlement at his lawyer's office, without advice of independent counsel at any point, raises material fact issues of duress and constructive fraud which require additional testimony by the parties. Fraudulent concealment by a party to an agreement in these circumstances, where the non-disclosing spouse is sole manager of the undisclosed community estate, is not amenable to simple statutes or rules favoring finality, because the states have an interest in preventing fraud.

III.

Movant has not established that he is entitled to judgment as a matter of law for the reasons stated in Part I, hereinabove,

and for the additional reasons stated in Petitioner's Brief, which is appended to this pleading. These arguments and authorities are incorporated by reference here as if fully set forth at length.

IV.

PETITIONER'S CROSS-ACTION FOR PARTIAL SUMMARY JUDGMENT

SARAH RENAE M. WALTON, Petitioner, moves the Court for a partial summary judgment against Billy L. Lee, Respondent, on the grounds that:

a. By taking the position in the March 3, 1992, hearing before this Court that petitioner would be entitled to a division of two years of respondent's pension under the USFSPA, as amended, Respondent has made a judicial admission of liability herein.

b. There is no genuine issue as to any material fact necessary to establish these admissions by respondent's attorney, acting as his sworn agent under Texas law. Petitioner is entitled to judgment as a matter of law where Respondent openly concedes liability.

c. Petitioner further moves for partial summary judgment on the issue of liability based on the Court's file in No. 28,813, In

the Matter of the Marriage of Billy L. Lee and Sarah (Renae) Lee, of which the Court took judicial notice during the March 3, 1992, hearing - on the basis of the Property Settlement Agreement and Decree of Divorce appended to Respondent's Motion for Summary Judgment as an exhibit, -and on Respondent's admission contained in his affidavit that said decree did not address division of his military retirement pay. As a matter of law, these admissions are sufficient to merit division of Respondent's military retirement pay under Texas law. Petitioner requests judgment accordingly.

WHEREFORE, PREMISES CONSIDERED, Petitioner respectfully prays that this Honorable Court deny Respondent Billy Lee his Motion for Summary Judgment and set Petitioner's Motion for Partial Summary Judgment of hearing on the same day as has been set for Respondent's Motion for Summary Judgment, with notice to Respondent, and that, on final hearing of this Motion, the Court render judgment that the Respondent take nothing and that Petitioner recover costs and reasonable attorney's fees from Respondent.

Petitioner prays for general relief.

Respectfully submitted,

s/Jack Lawrence

Jack Lawrence
Attorney at Law
5250 Landry
Beaumont, Texas 77708
SBN #12043800
(409) 892-6854

AFFIDAVIT

THE STATE OF TEXAS

COUNTY OF HARRIS

BEFORE ME, the undersigned official, on this day appeared SARAH RENAE M. WALTON, who is personally known to me, and having first been duly sworn according to law, and being of sound mind, upon her oath did depose and say of her own free will and accord:

"My name is Sarah Renae M. Walton, I am over eighteen years of age, and I reside at 8322 Oakhaven, La Porte, Harris County, Texas 77571. I have never been convicted of a crime, and I am fully competent to make this affidavit. I have personal knowledge of the facts stated herein, and they are all true and correct.

In the 15 years that I was formally married to Bill Lee, we always lived together except for the times he was in Thailand and Vietnam, and the armed services would not allow me to go along.

When we divorced in 1976, Bill insisted upon retaining a lawyer for us both. Bill insisted on handling everything and on paying the lawyer to prepare the divorce papers, Bill told me that

I would go along with the way he wanted the divorce or you'll be sorry because you know what a son of a bitch I can be."

SECOND PAGE OF SWORN AFFIDAVIT OF SARAH RENAE WALTON

During the weeks prior to our divorce, we did discuss the property settlement.

However, I then knew nothing of his pension rights nor did he ever mention it.

I did not know until about 3-4 years ago that I might be entitled to a portion of his pension.

I went to the lawyer's office only once that I remember, to sign the divorce papers. I did not have independent legal advice before signing said papers. I also did not appear in court during the dissolution proceeding.

In 1987, when my youngest son, Kyle, was 15 years old, he decided to live with his father. Bill again insisted on having a lawyer prepare the papers giving him legal custody. While I did have an attorney look at these papers before I signed them, I also received the attached letter from Bill's attorney, John Oxley, which

is dated March 25, 1988.

I was present at the hearing in the Ninth/Second Ninth District Court on March 3, 1992. I specifically heard Mr. Oxley take the position that I would be entitled to division of two years of Bill Lee's military retirement pay under the Uniformed Services Former Spouses Protection Act, as it is now written.

This concludes my statement."

SIGNED this 1 day of October, 1992.

s/ Sarah Renae M. Walton
SARAH RENAE M. WALTON

SUBSCRIBED AND SWORN TO BEFORE ME ON THE 1 day of October, 1992, to certify which witness my hand and official seal.

s/Joy Fitzgerald
NOTARY PUBLIC in and for
THE STATE OF TEXAS
My commission expires: 12/8/92
Printed name of notary:
Joy Fitzgerald

John L. Oxley
Attorney at Law

301 S. Madison
P.O. Box 156
Madisonville, Texas 77864

(409) 348-2601
(409) 348-6121

March 25, 1988

Mrs. Sarah Renae Walton
2014 Alydar
Pasadena, Texas 77503

RE: No. 5942; In the Interest of Kyle Leon Lee, a Minor Child In the 278th Judicial District Court of Madison County, Texas

Dear Mrs. Walton:

You will please find enclosed on the above-numbered and entitled cause a copy of the Order on Motion to Modify in Suit Affecting the Parent-Child Relationship as signed by the judge and entered with the Court on March 14, 1988.

I apologize for the delay in hearing this matter. However, Montgomery County received the paperwork in early November and did not transfer it to Madison County until February.

Should you have any questions, please do not hesitate to contact my office. Thanking you for the opportunity to be of assistance, and with kind regards, I am

Sincerely yours,

s/ John L. Oxley/blm

John L. Oxley

JLO:blm
Enclosure

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the above and foregoing Response to Motion for Summary Judgment and Cross-Action for Partial Summary Judgment was delivered by certified mail, return receipt requested to John Oxley, Attorney for Respondent, 201 South Madison, Madisonville, Texas 77864, on this the 19th day of October, 1992, in accordance with the Texas Rules of Civil Procedure.

s/b Jack Lawrence

92-01-00153-CV

IN THE MATTER OF IN THE MARRIAGE OF SARAH RENAE M. WALTON AND BILLY L. LEE, JR.	I I I I	IN THE DISTRICT COURT OF MONTGOMERY COUNTY, TEXAS 9TH/2ND 9TH JUDICIAL DISTRICT

PETITIONER'S FIRST AMENDED ORIGINAL PETITION FOR DIVISION OF COMMUNITY PROPERTY

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW SARAH RENAE M. WALTON, Petitioner herein, and by and through her attorney of record, JACK LAWRENCE, files this her First Amended Original Petition for Division of Community Property which was not divided by a divorce decree rendered by this Court on November 4, 1976, and before November 1, 1987, and for cause of action would respectfully show unto the Court:

I.

Petitioner is an individual who is currently residing in La Porte, Harris County, Texas.

II.

Respondent, Billy L. Lee, Jr., is a resident citizen of Grimes County, Texas, and service of citation has been had upon person in this cause at his residence at Route 1, Box 429, Bedias, Texas

77831.

III.

The jurisdiction of this Court to hear this action is conferred by Texas Family Code § 3.91(a) (Vern. Supp. 1991), and partition in accord with said statute is the relief sought.

IV.

Petitioner and Respondent were married on August 3, 1961.

V.

The parties were divorced on November 4, 1976, by a decree of divorce rendered in Cause No. 28,813, and styled: In the Matter of the Marriage of Billy L. Lee and Sarah Renae Lee, in the Ninth District Court of Montgomery County, Texas. A true and correct copy of the decree of divorce is attached to this petition as Exhibit "A" and is incorporated by reference and made a part of this petition as if fully set forth at length herein.

VI.

During the marriage of Petitioner and Respondent, the parties acquired the following undivided assets as their community property:

The military retirement and pension pay and benefits provided under a plan created for that purpose by Respondent's employer, the United States Air Force. Because these benefits and pay were not divided at the time of divorce, Petitioner should be awarded a just and right division of these benefits.

The exact dollar amount of the community estate which remains to be divided is presently unliquidated, but is in excess of the minimum jurisdictional limits of the Court. However, Respondent herein entered the U.S. Air Force on or about January 7, 1959. He retired as a Senior Master Sergeant (E8 pay level) on or about July 31, 1981. His rank on the date of divorce was Master Sergeant. The amount of gross retirement pay which he has received in some form since July 31, 1981, and prior to November 30, 1991, can be approximated to be in excess of $125,000.00. Because this suit also seeks partition of other retirement benefits than pay, and of pay and benefits which Respondent has not yet received, the community estate to be valued and partitioned is therefore potentially in excess of any amount stated or suggested herein.

VII.

The corpus of the military retirement pay and benefits is being held by Respondent in the amounts previously disbursed to the extent it has not been reallocated for personal or for familial use, and by the United States Air Force, whose address for service of process is Commander, Air Force Accounting & Finance Center, Att'n.: JAL, Denver, Colorado 80279-5000. Issuance of process to the Air Force is not required at this time.

VIII.

The Ninth Judicial District Court of Montgomery County, Texas, failed to dispose of the property described In Section VI., above, which is subject to division under the laws of the State of Texas, even though it had jurisdiction to do so. In fact, the Decree of Divorce in Cause No. 28,813 does not speak to military retirement pay or benefits in any part. Therefore, the parties still hold this property in a tenancy in common, and a division of the estate by partition is necessary for this Court to complete its property division. Accordingly, Petitioner requests the Court to divide the property between the parties in a manner that the Court

deems just and right, with due regard being given to the rights of each party, as provided by law.

IX.

Respondent consented to the jurisdiction of this Court by filing the original divorce action before this Court.

X.

In the alternative, if Petitioner be not upheld under the theory of statutory partition stated above, Petitioner would state as grounds for an alternative basis of recovery on the facts alleged in Items I, II, and IV through IX, above, which should be incorporated by reference as if fully set forth at length herein, that she is entitled to an equitable partition of such benefits under the rule of Harrell v. Harrell, 692 S.W.2d 876 (Tex. 1985), and requests the Court to balance the equities and divide the community estate according to reason and equity, and in accord with precedent.

XI.

In the alternative, Petitioner incorporates by reference all of the allegations stated in items I, II, and IV-IX, above, as if fully set forth at length herein, and would show the Court that, if and only

if this Court does not rule in favor of Petitioner on her primary theories of recovery alleged above, and instead finds that her cause of action has been preempted by Federal legislation, Petitioner requests the Court to award her a division in equity of a minimum of two years of Respondent's military retirement pay and benefits under the terms of the USFSPA or Uniformed Services Former Spouses' Protection Act.

XII.

In order to prepare and prosecute this suit on Petitioner's behalf, it was necessary for Petitioner to obtain the services of Jack Lawrence, an attorney duly licensed by the State of Texas. Petitioner requests that Respondent be ordered to pay reasonable attorney's fees for services rendered by Jack Lawrence in connection with this suit, which fees should be taxed as costs and paid directly to Jack Lawrence.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Petitioner respectfully prays the Court that Respondent be allowed to amend his answer to respond to the further allegations of Petitioner, and

that, upon final hearing of this cause, that Petitioner be granted Judgment and relief as follows:

1. Determining that Respondent's military retirement pay and benefits are susceptible to partition and directing partition in accordance with the respective shares in their tenancy in common of both parities.

2. Dividing the military retirement pay and benefits of Bill Lee and setting aside to Petitioner at least a 50% interest in them.

3. As to sums now already paid out to Bill Lee from his retirement and/or pension, for payment in cash or kind from the community estate, of a sum equal to at least 50% of the value of the assets, as is just and right.

4. For attorney's fees incurred in bringing this action.

5. For expenses and costs of court in bringing this suit.

6. For interest at the statutory rate on Petitioner's share of the retirement pay now already disbursed to Respondent.

7. For such further relief, in law or equity, to which Petitioner may otherwise be entitled, and for general relief.

Respectfully submitted,

s/ Jack Lawrence

Jack Lawrence, Attorney at Law
5250 Landry
Beaumont, Texas 77708

SBOT #12043800
(409) 892-6854

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the above and foregoing Petitioner's First Amended Original Petition for Division of Community Property has been served on Respondent, through his attorney, John Oxley, P.O. 158, Madisonville, Texas, by certified mail, return receipt requested, on this the 7th day of March, 1992.

s/b Jack Lawrence